

1608039 (Migration) [2018] AATA 3153 (29 June 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1608039

MEMBERS: Moira Brophy (Presiding)

Scott Clarey

DATE: 29 June 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decisions not to grant the visa applicants' Partner (Provisional) (Class UF) visas.

Statement made on 29 June 2018 at 4:46pm

Statement made on 29 June 2018 at 4:39pm

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – Whether the applicant is the de facto partner of the sponsor – Evidence of joint household responsibilities and finances limited by circumstance – Witness credibility – Untruthful evidence provided to the tribunal – Evidence suggests significant, ongoing relationship with former partner – Limited evidence of social aspects of the relationship – Limited evidence of commitment – Whether the additional criteria for a de facto relationship are met – Relationship not ongoing for longer than 12 months prior to application – No compassionate circumstances to waive requirement – Whether the parties had married by the time of decision – Parties not married – Inconsistent evidence in regards to intention to marriage – Decision affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 5CB, 65, 359A, 359AA

Migration Regulations 1994 (Cth), rr 1.09A(3), 2.03A, Schedule 2, cl 309.211, 309.221, 309.224

CASES

Paduano v MIMIA [2005] FCA 211

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 25 May 2016 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 27 May 2015 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211 and cl.309.221.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) and 309.221 because the delegate was not satisfied that the applicant is the spouse or de facto partner of the sponsor.
4. The review applicant appeared before the Tribunal on 27 February 2018, 20 April 2018 and 31 May 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant via telephone and heard evidence from [two witnesses].
5. The review applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearings. The Tribunal hearings were conducted with the assistance of an interpreter in the Vietnamese and English languages.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the de facto partner of the sponsor.
8. *Relevant background*
9. The visa applicant (from herein [Ms A]) is [a particular age] year old female who resides in Vietnam. The Tribunal accepts that [Ms A] was previously married [in] October 1996. This marriage ended in divorce [in] February 2014. The visa applicant has two children from this relationship (and in total): [names and birth dates of children removed]. Both children are secondary applicants to this application.
10. The review applicant (from herein [Mr B]) is [a particular age] year old male who resides in Australia. The Tribunal accepts that [Mr B] first arrived in Australia in 1991 on a humanitarian visa and subsequently sponsored his then wife, [Ms C] to Australia. The Tribunal accepts this marriage ended in divorce [in] October 2006. [Mr B] has three children from this relationship (and in total): [names and birth dates removed]. The Tribunal notes that [Mr B] was formerly known by a different [name].
11. At the time of application the parties stated that they first met in April 2006 but in subsequent statements and in oral evidence at the hearing, they stated they had known each other for a much longer period as [Ms A] was at one point [Mr B]'s sister-in-law ([Mr B] was previously married to [Ms A]'s sister). The parties began to communicate more regularly in 2006

following the divorce of [Mr B] and [Ms A]'s sister. By his own admission, [Mr B] had been an abusive alcoholic within his married relationship with [Ms A]'s sister, and [Ms A] had been the victim of domestic violence at the hands of her former husband. Both parties gave evidence that they spoke about, and bonded through, these common threads to their lives. In a signed statement and in oral evidence, [Mr B] stated he had advised [Ms A] to stay in her abusive marriage for the sake of her children.

12. At the time of application both parties stated that they 'committed to a shared life together to the exclusion of all others' [in] October 2014. [Ms A] subsequently told the Department during an interview on 18 January 2016 relating to her visa application that the parties committed to a relationship during a three week trip [Mr B] took to Vietnam in September/October 2014. This accords with the information provided on the original visa application form. Both [Mr B] and [Ms A] gave oral evidence at the Tribunal hearing that their committed relationship began during this trip in September/October 2014. The parties became engaged on or around [a particular date in] October 2014.
13. The Tribunal notes that on their original visa application form the parties expressed an intention to marry on [a particular date in] April 2016. They did not follow through on this intention. The parties are not married at the time of this decision and have never been married to each other. Varying reasons have been provided as to why the parties have not married as once intended. [Ms A]'s mother died [in] July 2014. [Mr B] and [Ms A] both gave oral evidence that their intention to marry could not be carried out due to a specific cultural prohibition on getting married in the aftermath of a significant relative's death. The Tribunal notes however that in a submission on 1 May 2018, the parties gave a different explanation for why the wedding had not taken place as planned. The statement suggests the intended wedding never took place due to [Ms A]'s stalled visa application. This indicates to the Tribunal that the wedding was contingent on the visa being granted. No mention was made in this statement of the cultural prohibition on the wedding taking place in the wake of [Ms A]'s mother's death. The Tribunal is mindful of the fact the couple did hold an engagement celebration (photos of which have been viewed by the Tribunal), an important cultural event in the context of the relationship, on or around [a particular date in] October 2014, three months after [Ms A]'s mother's death.

14. **TRIBUNAL PROCEEDINGS**

15. The Tribunal notes that [Mr B]'s representative raised issues about the quality of the Tribunal interpreters on multiple occasions. The Tribunal made attempts to address the concerns raised by the representative. A different Vietnamese interpreter was organised for each of the three hearings. The Tribunal notes that all of the interpreters used at the hearings were accredited with the National Accreditation Authority for Translators and Interpreters (NAATI) at level two or above.

16. *Credibility*

17. At the outset the Tribunal records that there were significant credibility issues arising from specific information provided by [Mr B].
18. During the hearings the Tribunal found [Mr B] to be at times evasive and hesitant when answering direct questions. He frequently responded off point and/or did not give specific answers or information to the Tribunal. This included evidence relating to his travel history to Vietnam and his continuing contact with his ex-wife, who the Tribunal notes is also [Ms A]'s sister.
19. The Tribunal has limited evidence before it relating to [Mr B]'s medical conditions. The Tribunal notes that there is some documentary evidence that [Mr B] suffers from a heart

condition and depression. The Tribunal has had regard to this evidence, which includes: a letter (dated [in] May 2014) from [Dr D] about an overnight stay in [Hospital 1] after [Mr B] presented with chest pain; a reminder letter (dated [in] February 2014) addressed to [Mr B] for an appointment at [Medical Clinic 1]; and a Centrelink medical certificate (dated [in] January 2017 and signed by [Dr E]) that states [Mr B] has heart conditions that include symptoms of chest pain and shortness of breath, and depression “with low mood lack energy and concentration”.

20. The Tribunal notes that according to a letter from [Dr E] (dated [in] February 2018), [Mr B] takes medication for his depression and that “As a symptom of [[Mr B]’s] depression or side effect of medication his memory and concentration can be adversely affected”. The Tribunal accepts that [Mr B] has diagnosed medical conditions, including mental health issues, and is on medication which may impair his memory. Consequently, the Tribunal has made significant allowances for [Mr B]’s inability to remember specific facts such as dates, and his at times confused evidence. These allowances do not extend to the explicit and categorical statements made by [Mr B] to explain his travel to Vietnam on three separate occasions that coincided almost entirely with trips made by his ex-wife.
21. [Mr B] gave oral evidence that he had limited contact with his ex-wife since their divorce in 2006, and their infrequent communication primarily related to the welfare of their children. When asked about his travel history to Vietnam, [Mr B] explicitly said that he did not travel together with his ex-wife, stating “I would leave the country two days before her or some days after her or I could even leave on the same day just different flights because it’s a free country and I wouldn’t tell lies to the government but I don’t care about the coincidences of leaving around the same time”. The Tribunal questioned [Mr B] further, stating it found it hard to believe that it was happenstance that he travelled to Vietnam on three separate occasions at the same time as his ex-wife. [Mr B] responded that this was “just pure coincidences. I had no knowledge that she was there at the same time”.
22. On 14 June 2018, pursuant to s.359A of the Act, the Tribunal wrote to [Mr B] to give him clear particulars of information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review.
23. The Tribunal informed [Mr B] in the letter that the particulars of the information were:
 - According to individual Movement Records for [Mr B] and his ex-wife [Ms C], since 2006 [Mr B] and [Ms A] have been absent from Australia over similar periods on the following occasions:
 - Trip 1 [Mr B]: 13 December 2007 to 19 February 2008
 - Trip 1 [Ms C]: 1 December 2007 to 9 February 2008
 - Trip 2 [Mr B]: 23 September 2014 to 7 October 2014
 - Trip 2 [Ms C]: 22 September 2014 to 6 October 2014
 - Trip 3 [Mr B]: 31 July 2015 to 18 August 2015
 - Trip 3 [Ms C]: 16 July 2015 to 8 August 2015
24. The Tribunal informed [Mr B] that this information was relevant to the review because to meet the definition of ‘de facto partner’ under s.5CB of the Act, [Mr B] must be in a relationship where he and [Ms A] (the visa applicant) both “have a mutual commitment to a shared life to the exclusion of all others” (s.5CB(2)(a)), that is “genuine and continuing”

(s.5CB(2)(b)). The Tribunal explained that this information was relevant because he had claimed to be in a de facto relationship with [Ms A] during part of the periods he had travelled on similar dates as his ex-wife and this information may go towards the assessment of whether he and [Ms A] had a mutual commitment to a shared life to the exclusion of all others. The Tribunal explained in the letter that this information was also relevant because it undermined his claim at the Tribunal hearing that he had not travelled together with his ex-wife during those periods.

25. [Mr B] was informed that if the Tribunal relied on this information in making its decision, it may find that he and his ex-wife had travelled together on numerous occasions during part of the period he had claimed to be in a relationship with [Ms A], and conclude that [Mr B] and [Ms A] were not in a genuine relationship and were not committed to a shared life with each other to the exclusion of all others. Further, it might cast doubt generally on the evidence [Mr B] provided to the Tribunal about his relationship and undermine his claim that he did not travel together with his ex-wife, which may lead the Tribunal to doubt his credibility. [Mr B] was informed that if the Tribunal made these findings, it may then conclude that he and [Ms A] did not have a mutual commitment to each other, and ultimately that he was not in a de facto relationship with [Ms A] (s.5CB), and therefore did not meet cl.309.211(2) of the Regulations.
26. The Tribunal explained to [Mr B] that the consequence of relying on this information is that it would be the reason, or a part of the reason, for the Tribunal to affirm the Department's decision not to grant Partner (Provisional) (Class UF) visas.
27. The Tribunal invited [Mr B] to comment on or respond to the information within two weeks of the date of the Tribunal's letter. On 28 June 2018, prior to the stated deadline, [Mr B] provided a written submission in response to the Tribunal's letter.
28. In response to the first travel overlap in December 2007-February 2008 ('Trip 1' referred to in paragraph 20), the submission states that [Mr B] did not have any knowledge of his ex-wife's travel during this trip, that "he [[Mr B]] hadn't any idea about this, as he was too busy drinking and gambling at the time. He did not care less about anyone in the family including his three biological children too".
29. In response to the second travel overlap in September/October 2014 ('Trip 2' referred to in paragraph 20), the submission states that "the purposes of this trip were firstly to pay respect and fix his parents' graves in [Vietnam] with [Ms A] and his younger brother and his sister in law together. Secondly, he wanted to have an engagement ceremony with [Ms A] (his current partner)". The submission states that [Ms C]'s travel to Vietnam during this period was with her daughter (also [Mr B]'s daughter) and that the purpose of the trip was to visit her brother who was convalescing after an operation and also to "pay respects to her parents". The submission states that while the travel was coincidental and unrelated, "[Mr B] could have been informed about this [his ex-wife's trip to Vietnam] through his daughter. However he showed very little interests about his ex-wife affairs, because he was thinking of his partner rather than his ex-wife. He considered his ex-wife to be as friendly as needed to be and that was the end of the story. He can only worry about his own life and his partner in Vietnam".
30. In response to the third travel overlap in July/August 2015 ('Trip 3' referred to in paragraph 20), the submission states that "the purposes for this trip were to pay respect for his [[Mr B]'s] partner's mother first anniversary and then to spend some time with his partner and her two children together". The submission states that the purpose of [Ms C]'s trip to Vietnam during this period was to also mark the one year anniversary of her mother's passing. [Ms C] was accompanied by her youngest daughter (also [Mr B]'s daughter).

31. After careful consideration of the response received on 28 June, and taking into consideration the oral evidence at the hearing, the Tribunal remains unsatisfied that the reasons for [Mr B]'s largely concurrent travel with his ex-wife during these three trips to Vietnam can be plausibly explained as a coincidence. The Tribunal does not accept this explanation. The Tribunal has formed the view that [Mr B] has not been truthful in his evidence and that he is willing to provide untruthful information when he considers it helpful to his case. This has led the Tribunal to doubt the credibility and reliability of [Mr B]'s evidence. The Tribunal finds that this also suggests a significant, ongoing relationship between the sponsor and his ex-wife.

Whether the parties are in a spouse or de facto relationship

32. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision [Ms A] is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case [Ms A] claims to be the de facto partner of [Mr B] who is became an Australian citizen by grant [in] 1993.

Are the parties in a de facto relationship?

33. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
34. In forming an opinion whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of [Ms A]'s and review applicant's household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
35. [Mr B] was put on notice of the application being assessed as a de facto relationship at the hearing. He was also advised that there are time requirements relating to de facto relationships under the legislation.

36. *Financial aspects of the relationship*

37. The Tribunal has considered the financial aspects of the relationship, including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
38. The Tribunal accepts that [Mr B]'s sole income is a disability support pension he receives through Centrelink. The Tribunal accepts that [Ms A] works [in a business] in Vietnam owned by her older sister (not [Mr B]'s former wife).
39. The Tribunal accepts that since June 2015 [Mr B] has periodically transferred money to [Ms A]. The Tribunal has before it documentary evidence of these money transfers, in the form of transfer receipts (including four transfers in 2015 totalling \$6,000; five transfers in 2016 totalling \$2,500; two transfers in 2017 of \$500 and \$300; and three transfers in 2018 totalling \$1000). The Tribunal accepts [Mr B]'s evidence that he does not specify that the money be used by [Ms A] for a specific purpose but that he believes it is generally put toward general living expenses and costs associated with her children's education.

40. The Tribunal accepts that the parties do not have a joint bank account, and do not otherwise pool their financial resources in any way. There is no other evidence before the Tribunal of any joint liabilities and/or legal obligations owed by the parties in respect of each other. The Tribunal notes that it has no evidence before it of any financial relationship between the parties prior to mid-2015.
41. The Tribunal accepts there is a degree of difficulty in establishing and sharing financial resources when the parties live in separate countries. Accordingly, their physical separation means that, as at the time of this decision, they will have had limited opportunities to pool their financial resources and share their day-to-day household expenses.
42. The Tribunal places limited weight on the financial aspects of the relationship.

43. *Nature of the household*

44. The Tribunal has considered the nature of the household, including any joint responsibility for the care and support of children, living arrangements of the parties and the sharing of the responsibility for housework. The Tribunal acknowledges that the parties are living in different countries and have never lived together on a permanent basis. The Tribunal notes that since their engagement in 2014, the parties have only spent approximately five weeks together in total during two brief visits to Vietnam by [Mr B] in 2015 and again in 2017.
45. The Tribunal notes that, at the time of this decision, no evidence has been provided to the Tribunal about any current sharing of the responsibility for housework. This is unsurprising given that the parties live in different countries and have never lived together on a permanent basis.
46. There is no evidence before the Tribunal that the couple have shared responsibility for the care and support of children, other than claims that some of the funds that [Mr B] periodically sends to [Ms A] may have been put toward costs associated with her children's education.
47. The Tribunal places little weight on this aspect of the relationship.

48. *Social aspects of the relationship*

49. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
50. The Tribunal notes that the parties live in different countries and have spent very little time together since the inception of their claimed committed partner relationship in September/October 2014. Subsequent to the trip in September/October 2014 during which the parties claim to have become engaged, the Tribunal accepts that the sponsor has travelled to Vietnam on two separate occasions; for approximately 2.5 weeks in August 2015 and again for approximately 2.5 weeks in September 2017. In total, the parties have spent less than six weeks together in each other's company since they committed to a shared life together. The Tribunal acknowledges that due to [Mr B]'s financial circumstances, he has limited capacity to regularly travel to Vietnam.
51. The Tribunal questioned the parties about their social interactions and activities as a couple. The Tribunal notes [Mr B] could not provide any significant details of [Ms A]'s social life and could not name any of her friends when asked to do so.

52. The Tribunal notes that, at the time of this decision, there is limited evidence before it of the opinions of the parties' friends, family members and/or acquaintances about the nature of their relationship. The Tribunal acknowledges that an engagement party was held on or around [a particular date in] October 2014, and on their evidence friends and family members of the parties attended. With respect to whether the parties plan and undertake joint social activities, the Tribunal has considered copies of photos submitted as evidence to the Tribunal of the couple in various social settings. The Tribunal is prepared to accept that the parties have undertaken some social activities together and that at least on some occasions represent themselves to others as being in a relationship. The Tribunal notes that, other than these photos, there is very little information or evidence before it of social aspects of the relationship or that they represent themselves to others as being in a genuine and committed relationship. The Tribunal notes that other than the parties themselves, it heard no evidence from anybody who had seen the couple together and/or who had spent time in the company of the couple.
53. The Tribunal places limited weight on the social aspect of the relationship.
54. *Nature of the persons' commitment to each other*
55. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
56. The Tribunal questioned both parties about their knowledge of each other. [Mr B] demonstrated some knowledge about [Ms A]'s life in Vietnam, including her job, living arrangements and family composition. [Mr B] gave vague oral evidence regarding other aspects of [Ms A]'s life, including her interests outside of work and how she occupies her spare time, and he could not name any of her friends when asked. [Ms A] demonstrated good knowledge of [Mr B]'s life history in coming to Australia, his previous employment, his current living arrangements and his family composition.
57. The Tribunal has considered phone records of [Mr B] submitted by the parties from a period of October 2014 to January 2018. The Tribunal accepts that these records contain some evidence of regular communication during this time period between [Mr B] and a telephone number associated with [Ms A]. Given the claimed frequency of contact between the parties, the Tribunal would expect that [Mr B] would have better knowledge of the day-to-day circumstances and activities of [Ms A] than was demonstrated at the hearings. Given this, and combined with the fact that the parties have an established, long-standing familial relationship ([Mr B] was previously married to [Ms A]'s sister for nearly 20 years), the Tribunal does not accept that evidence of phone conversations taking place over a sustained period of time is necessarily indicative of a couple in a genuine and continuing partner relationship.
58. The Tribunal has regarded the cumulative effect of the inconsistencies in the evidence of the parties and did not see it as being indicative of a relationship between parties who have a mutual commitment to a shared life together. The Tribunal places considerable weight on this evidence as it indicates either the parties do not communicate as claimed or they do not draw the companionship and emotional support from each other as claimed. The Tribunal has taken into account the physical distance between the parties and the difficulties this could present in maintaining a relationship. However the Tribunal finds that there is little independent evidence that the parties provide each other with companionship and emotional support.

59. Having regard to all evidence of the relationship cumulatively, including issues related to the credibility of [Mr B], the Tribunal is not satisfied that the parties were in a genuine and continuing relationship at the time of application or at the time of this decision. On the evidence available to it the Tribunal is not satisfied [Ms A] and [Mr B] have established that they are in a genuine and continuing relationship or have a mutual commitment to a shared life together to the exclusion of all others or that they are not living separately and apart on a permanent basis.
60. On the basis of the above the Tribunal is not satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and at the time of this decision. The Tribunal is not satisfied that the parties live together, or do not live separately and apart on a permanent basis. Therefore the requirements of s.5CB(2)(d) are not met. There is no evidence that [Ms A] is able to meet any of the alternative criteria.
61. Therefore, [Ms A] does not meet cl.309.211 and cl.309.221.
62. While the Tribunal is not satisfied that the parties were in a genuine and continuing relationship at the time of application or at the time of decision, for completion the Tribunal has considered the additional criteria.

Are the additional criteria for a de facto relationship met?

63. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
64. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
65. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement. The Tribunal accepts that the parties have known each other for a long time, as [Ms A] was previously [Mr B]'s sister-in-law (he was married to [Ms A]'s sister). The Tribunal accepts that the parties began to correspond more frequently after [Mr B]'s divorce from [Ms A]'s sister in 2006. The parties have given evidence that their committed relationship began on or around [a particular date in] October 2014 on multiple occasions, including:
- on the original visa application form lodged on 5 June 2015
 - in a written statement by [Mr B] dated 8 June 2015
 - in an oral answer provided by [Ms A] during an interview conducted by the Department in Vietnam on 18 January 2016
 - in oral evidence from [Mr B] to the Tribunal
 - in oral evidence from [Ms A] to the Tribunal

66. The Tribunal also notes the parties' multiple and explicit declarations that they claim to have committed to a shared life together to the exclusion of all others on or around [a particular date in] October 2014 during a brief trip to Vietnam by [Mr B]. The Tribunal notes that in a submission made on 28 June 2018, it was claimed that the parties "had already started their close friendship right after his partner divorce from her formal husband. They started his relationship after they both legally divorced. Therefore, they both into a de facto relationship, and they both committed to each other (r.109A (3) (d)) since then". The Tribunal notes that this statement appears to be inconsistent with the multiple other statements made by the parties (listed above) that the claimed committed relationship began on or around [a particular date in] October 2014.
67. The Tribunal notes that there has been limited documentary evidence submitted to support the existence of the relationship in general. Of the limited evidence that is available to it, the Tribunal notes that the earliest record of a financial transfer between [Mr B] and [Ms A] is in June 2015. The Tribunal also notes that the earliest phone record submitted in support of the application is from August 2014. Other than the statement from the 28 June submission, there is no other evidence before the Tribunal that the claimed de facto relationship began prior to the stated time in September/October 2014.
68. On the weight of evidence before it, including the parties' multiple explicit declarations and documentary evidence including records of phone calls and financial transfers, the Tribunal is satisfied that the claimed de facto relationship commenced on or around [a particular date in] October 2014.
69. The Tribunal is satisfied that the visa application was lodged on 5 June 2015. Accordingly, if the Tribunal had found the relationship existed at the time of application, the Tribunal would not be satisfied that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.
70. Therefore, the issue before the Tribunal is whether [Ms A] can establish compelling and compassionate circumstances for the grant of the visa: r.2.03A(3). The expression 'compelling and compassionate circumstances for the grant of the visa' is not defined in the legislation. Having regard to the ordinary meaning of the words, 'compassionate' suggests 'circumstances that invoke sympathy or pity'. 'Compelling' in its wide, ordinary meaning means 'forceful' and, therefore, convincing: see *Paduano v MIMIA* [2005] FCA 211.
71. The Tribunal asked [Mr B] if he could establish compelling and compassionate reasons for the grant of the visa. In response, [Mr B] said that he acknowledged the circumstances of his relationship are somewhat unique, in that he now claims to be in love with the sister of his former wife, but that their love was genuine and they have a deep understanding of each other. The parties felt that due to the death of [Ms A]'s mother in law that they did not need to have a wedding to prove how they felt about each other. He said that if the relationship was a sham for financial purposes, then [Ms A] would not have allowed him to have sexual relations with her. [Mr B] offered to provide the Tribunal with evidence of the sexual nature of his relationship with [Ms A].
72. In reference to this response, [Mr B]'s representative told the Tribunal that his client had gone "off the boil" and was not "fully functioning". The representative reiterated that his client had documented medical conditions relating to his heart that should be considered a compassionate circumstance for the grant of the visa.
73. The Tribunal has carefully considered these responses, and the evidence to which they refer. The Tribunal notes that there is some documentary evidence on the Tribunal's file that [Mr B] suffers from a heart condition and depression. The Tribunal has had regard to this evidence, which includes: a letter (dated [in] May 2014) from [Dr D] about an overnight stay

in [Hospital 1] after [Mr B] presented with chest pain; a reminder letter (dated [in] February 2014) addressed to [Mr B] for an appointment at [Medical Clinic 1]; and a Centrelink medical certificate (dated [in] January 2017 and signed by [Dr E]) that states [Mr B] has heart conditions (that include symptoms of chest pain and shortness of breath) and depression “with low mood lack energy and concentration” .

74. The Tribunal notes that according to a letter from [Dr E] (dated [in] February 2018), [Mr B] takes medication for his depression and that “As a symptom of [[Mr B]’s] depression or side effect of medication his memory and concentration can be adversely affected”. The Tribunal accepts that [Mr B] has diagnosed medical conditions, including mental health issues, and is on medication which may impair his memory.
75. The Tribunal has taken into account [Mr B]’s medical history. In the Tribunal’s view the parties did not provide any evidence that the Tribunal considers would constitute compelling and compassionate reasons for the grant of the visa. Accordingly, the Tribunal is not satisfied that there are compelling and compassionate reasons for the grant of the visa.
76. The Tribunal notes that while [Mr B] once held a humanitarian visa, this long predated the commencement of the claimed committed relationship between the parties. [Mr B] is an Australian citizen by grant [in] 1993. He was married to his first wife in 1987 and divorced in 2006. Therefore r.2.03A(4) does not apply.
77. For these reasons the Tribunal is not satisfied that [Ms A] meets the additional criteria prescribed in r.2.03A.

Do the parties intend to marry?

78. Clause 309.211(3) requires that at the time of application [Ms A] intends to validly marry a person who is an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. By the time of decision, the intended marriage must have taken place, and [Ms A] must continue to be the spouse of the intended spouse: cl.309.224.
79. ‘Spouse’ for these purposes is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of [Ms A]’s and review applicant’s household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.
80. The Tribunal notes that on the original visa application the parties expressed an intention to marry on [a particular date in] April 2016. They did not follow through on that intention. The parties are not married at the time of this decision and have never been married to each other. Varying reasons have been provided as to why the parties have not married as once intended. [Ms A]’s mother died [in] July 2014. [Mr B] and [Ms A] both gave oral evidence that their intention to marry could not be carried out due to a specific cultural prohibition on getting married in the aftermath of a significant relative’s death. The Tribunal notes however that in a submission on 1 May 2018, the parties gave a different explanation for why the wedding had not taken place as planned. The statement suggests the intended wedding never took place due to [Ms A]’s stalled visa application. This indicates to the Tribunal that the wedding was contingent on the visa being granted. No mention was made in this

statement of the cultural prohibition on the wedding taking place in the wake of [Ms A]'s mother's death.

81. While the Tribunal is satisfied that [Ms A] meets cl.309.211(3) in that she had expressed an intention at the time of application to marry the sponsor who is an Australian citizen, the Tribunal is not satisfied that [Ms A] meets cl.309.224 because the intended marriage had not taken place at the time of this decision (i.e. the parties are not married and have never been married to each other).
82. For the reasons above, [Ms A] does not satisfy the criteria for the grant of the visa.
83. In relation to the secondary visa applicants, the Tribunal finds that as [Mr B] and [Ms A] (the primary visa applicant) are not in a de facto relationship for the purposes of the Act, the secondary visa applicants cannot meet the criteria for a Subclass 309 visa as a member of the family unit of a person who has satisfied the primary criteria. The Tribunal must affirm the decision under review in relation to the secondary visa applicants.

DECISION

84. The Tribunal affirms the decisions not to grant the visa applicants' Partner (Provisional) (Class UF) visas.

Moir Brophy (Presiding)
Member

Scott Clarey
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).